

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>DANIEL W. KEHLER</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 144,560
<b>U.S.D. NO. 501</b>	)	
Respondent	)	
AND	)	
	)	
<b>CNA INSURANCE COMPANY</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant appeals from an Order Upon Remand entered June 7, 1996, by Assistant Director Brad E. Avery. Oral argument was heard on December 3, 1996.

**APPEARANCES**

Claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Rex W. Henoch of Lenexa, Kansas.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the stipulations of the parties are listed in the November 15, 1994 Award by Administrative Law Judge James R. Ward together with the additional deposition and exhibits admitted into evidence upon remand as listed in the Order upon remand of June 7, 1996.

**ISSUES**

This case was originally decided by Administrative Law Judge James R. Ward by his Award of November 15, 1994. Claimant appealed that Award to the Appeals Board. In his November 18, 1994 Petition for Review, claimant raised the following issues:

- "1. Nature and extent of the disability, functional impairment ought be 26% and work disability should be a minimum of 60.3% as shown by uncontroverted testimony of Bud Langston, which was not commented upon by the Administrative Law Judge.
- "2. Underpayment of TTD.
- "3. Whether claimant is entitled to have \$350.00 of unauthorized medical expense paid for examination and evaluation of his back.
- "4. Whether the ALJ may raise and decide issues not raised by the parties?
- "5. Whether an overpayment of TTD benefits may per K.S.A. 44-534a(b) be credited against an award of PPD due Claimant or must be solely recouped from the Workers' Compensation Fund?"

By its Order of May 12, 1995, the Appeals Board decided Issue 4, above by remanding this matter to the Administrative Law Judge for the taking of additional evidence on and for reconsideration of the issue concerning the appropriateness of vocational rehabilitation benefits. That issue was decided on June 7, 1996 by Assistant Director Brad E. Avery whereby the original Award of the Administrative Law Judge was affirmed. Claimant appealed that Order Upon Remand seeking Appeals Board review of "all issues determined adversely to claimant, including without limitation, whether claimant was entitled to a vocational rehabilitation evaluation."

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Before reaching the issues enumerated above, the Appeals Board must first decide the question raised by claimant concerning the appropriateness of Assistant Director Avery's Order Upon Remand, that is, whether the Assistant Director considered the entire record in determining the issue before him and, if not, whether it was error not to do so.

It is not clear from Assistant Director Avery's Order Upon Remand what record he considered. Under the paragraph entitled "Record" is enumerated the following: "The

record consists of the deposition of Daniel W. Kehler, dated October 12, 1995; the exhibits offered into evidence by the parties; and the pleadings and correspondence contained in the administrative file." Thus, the record specifically set forth by the Assistant Director as the basis for his Order appears to be limited to that which was developed subsequent to the Appeals Board's May 12, 1995 Order. However, the first sentence following the paragraph entitled "Findings of Fact & Conclusions of Law" reads: "Having reviewed the entire evidentiary of record, it is found as follows:" (emphasis added).

The Appeals Board's Order remanding this case to the Administrative Law Judge to reopen the record and permit the parties to present additional evidence on the issue of vocational rehabilitation was intended to address the claimant's alleged surprise and prejudice from the Administrative Law Judge's determination of that issue in the Award when it had not been specifically identified as an issue at regular hearing. Accordingly, upon remand the Appeals Board limited the additional evidence to "the sole issue of the appropriateness of vocational rehabilitation and the payment of temporary total disability compensation during vocational rehabilitation." Nevertheless, it is clear from the May 12, 1995 Order that there was other evidence in the record which was relevant to the issue of vocational rehabilitation. Even without the statements of the Appeals Board in its Order to this effect, it is obvious from the file on its face that there was other testimony and evidence in the record which directly pertained to the vocational rehabilitation issue. For example, vocational rehabilitation benefits for claimant were opposed by respondent and a hearing was necessary on the issue. The preliminary hearings were held on July 5, 1990 and June 14, 1991 before Administrative Law Judge Ward and his orders of July 5, 1990 and June 18, 1991 concerning vocational rehabilitation benefits including temporary total disability compensation during the evaluation process. Furthermore, this case was tried as a work disability claim. Testimony was presented by a vocational expert, as well as by claimant, concerning the claimant's work disability. This testimony was presented, together with that of the medical experts, to establish the extent to which claimant's ability to work in the open labor market and to earn a comparable wage had been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation. K.S.A. 1987 Supp. 44-510(e). Obviously, this evidence would bear a direct relation to the issue of claimant's entitlement to vocational rehabilitation benefits under the Workers Compensation Act. Therefore, any failure to consider the entire record in determining the issue upon remand would be error.

Whether or not the Assistant Director considered the entire record or, conversely, only considered the record enumerated in his Order Upon Remand is further complicated by the fact that respondent, in its January 25, 1996 submission letter and again in its March 19, 1996 supplemental submission letter in response to claimant's reply to the respondent's initial submission letter, argued that the Administrative Law Judge, upon remand, need only consider the "additional evidence" on vocational rehabilitation and

payment of temporary total disability compensation and that "the Board did not authorize a 'retrial' of the existing evidence." Claimant argued to the contrary that the Administrative Law Judge must consider all of the evidence in determining the issue upon remand.

The Appeals Board finds that the trier of fact should have considered the entire record, including the evidence which was presented before the Appeals Board's Order remanding this case to the Administrative Law Judge. During oral argument the parties requested and agreed that if the Appeals Board finds that the entire record should have been considered, that they would prefer that this matter not be remanded to the Assistant Director for either clarification that he did consider the entire record or for his reconsideration of the issue after having reviewed the entire record. Instead, the parties expressed a willingness that the Appeals Board retain jurisdiction of this matter and decide the issues. In the interest of judicial economy and expediting this case to a conclusion, the Appeals Board will accede to the request of the parties and decide all the issues, including the issue of vocational rehabilitation benefits in its present posture.

There was a second question raised which should also be addressed before reaching the merits of this appeal. Respondent alleges the Appeals Board previously decided all of the issues raised by the original appeal of the Administrative Law Judge's Award at the time of its May 12, 1995 Order of remand, with the sole exception of the issue concerning vocational rehabilitation which was remanded. The answer to this allegation is in the negative. It is clear that the May 12, 1995 Order was intended only to remand the case to the Administrative Law Judge for an order giving the parties a reasonable time to present additional evidence. The only limitation imposed by the Appeals Board was that such additional evidence pertain to the issue of vocational rehabilitation and the payment of temporary total disability compensation during vocational rehabilitation. However, the Order did not limit the Administrative Law Judge only to reconsideration of the vocational rehabilitation issue. The Order provided that "the Administrative Law Judge shall make such additional findings and orders as he finds necessary and appropriate upon the rehearing of this claim." Nowhere does the Appeals Board Order reflect a ruling on the merits of the other issues raised by the appeal. Just as the Administrative Law Judge was free to reconsider the other issues previously decided in his original Award should the new evidence indicate the need, so too is the Appeals Board free to do so. In fact, the Appeals Board is required to do so since those issues were never addressed by the Appeals Board in its previous Order. The respondent's argument that the May 12, 1995 Appeals Board Order of remand implicitly "upheld and affirmed Judge Ward's decision on the basis of the existing the evidence in the record" is without merit.

We now turn our attention to the issues for review. These issues have been extensively briefed and it is not necessary to repeat the arguments of the parties herein. With regard to the facts of this case, the Appeals Board finds that the findings and

conclusions of the Administrative Law Judge are both accurate and appropriate and the Appeals Board approves and adopts same as if specifically set forth herein. The Award by the Administrative Law Judge and the Order Upon Remand of the Assistant Director are affirmed.

K.S.A. 1987 Supp. 44-510(e) provides in pertinent part as follows:

"There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury."

Following his injury, claimant returned to work for respondent and performed his same janitorial job at a comparable wage for over two years before being terminated. The Appeals Board finds said termination was not due to claimant's injury and the evidence establishes that claimant retained the ability to earn a comparable wage. The presumption of no work disability contained in K.S.A. 1987 Supp. 44-510(e) has not been overcome. The Award of permanent partial disability compensation based upon claimant's percentage of functional impairment is affirmed.

The Appeals Board further agrees with and affirms the Administrative Law Judge's findings concerning claimant's average weekly wage and the amount of temporary total disability compensation due. However, claimant should be awarded his unauthorized medical expense. With regard to the issue of whether an overpayment of temporary total disability compensation may be credited against an award of permanent partial disability compensation, the Appeals Board finds that such a credit is mandated by K.S.A. 1987 Supp. 44-525(b) which provides that where a lump sum payment is due, "Credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award." See Ratzlaff v. Friedeman Service Store, 200 Kan. 430, 435, 436 P.2d 389 (1968), *over-ruled on other grounds* Farrell v. Day Zimmerman, 223 Kan 421, 573 P.2d 1065 (1978).

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award by Administrative Law Judge James R. Ward dated November 15, 1994, and the Order Upon Remand entered by Assistant Director Brad E. Avery date June 7, 1996, should be, and are hereby, affirmed, except that claimant is entitled to an unauthorized medical allowance up to the statutory limit.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1996.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Topeka, KS  
Rex W. Henoeh, Shawnee Mission, KS  
Brad E. Avery, Assistant Director  
Office of Administrative Law Judge, Topeka, KS  
Philip S. Harness, Director